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EARLY COURTS AND LAWYERS

It may be interesting to turn from the current discussion of present day courts and procedure to the courts and procedure of the early years of the republic.

Immigration to an unsettled country of wholly undeveloped resources was prompted by various motives. Some, moved by religious fervor, came primarily to worship and to escape intolerance and persecution; some, moved by spirit of adventure, were attracted by delusive prospects of easy fortune; some came away to escape the visitation of punishment which they justly deserved. As the motives that prompted their coming varied, so did the character of those who came. Easy terms of admission to the bar opened the field of legal practice to many who were undeserving. In fact the legal profession attracted more than its share of those who were brought here with purpose of adventure rather than of toil. These facts had their bearing upon the character of the colonial bar. In Virginia in the first half of the seventeenth century it is said, "the legal profession was held in somewhat low repute, being sometimes recruited by white freed men whose careers of rascality as attorneys in England had suddenly ended in penal servitude."¹ By another historian it is said the lawyers were, "for the most part pettifoggers and sharpers, broken adventurers from London, and indented servants, who, having been convicts, chose, on their release the profession which, in a rude state of society, gave them the best opportunity of fleecing the community."²

Conditions in the legal profession were such that the legislative assembly of Virginia from time to time took cognizance of it. In 1643 a law was made that lawyers should be licensed by the court and their fees regulated.³ Two years later all "mercenary attorneys" were "expelled from such office" because, the act said, "many troublesome suits are multiplied by the unskillfulness and covetousness of attorneys, who have more intended their own profit and their inordinate lucre than the good and benefit of their clients,"⁴ and soon thereafter (1647) it was "thought fitt that unto the act forbidding mercenary attor-

¹ 2 Fiske, *Old Virginia and her Neighbors*, 266.

² Lodge, *English Colonies in America*, 53.

³ 1 Hening, *Stats. at Large* (Va.), 275.

⁴ 1 Hening, *Stats. at Large* (Va.), 302.

neys, it bee added that they shall not take any recompence either directly or indirectly. . . . That in case the courts shall perceive that in any case either plt. or defendant by his weakness shall be like to loose his cause, that they themselves may either open the cause in such case of weakness or shall appoint some fitt man out of the people to plead the cause, and allow him satisfaction requisite, and not to allow any other attorneys in private causes betwixt man and man. . . .”⁵

The legislation of succeeding years was frequent but contradictory and vacillating. In 1656 all acts against mercenary attorneys were repealed and the governor and council were authorized to allow “such as they shall find fitt and able to be attorneys” for quarter courts, and the commissioners to do the like for county courts, the controversies about fees to be determined by the court.⁶ Finally, on March 26, 1658, an act was offered reviving the expulsion of attorneys. It was proposed in the assembly, “whether a regulation or totall ejection of lawyers?” By the first vote the burgesses said, “an ejection.”⁷ The governor and council answered that they would consent to this proposition “so farr as it shall be agreeable to Magna Charta.” A committee of the burgesses by way of reply to the answer of the governor and council said: “Wee have considered Magna Charta and wee cannot discerne any prohibition contained therein but that these propositions may pass into lawes,”⁸ and they did “pass into lawes.”⁹ As late as 1732 an act declared that “the number of unskilful attorneys, practising at the county courts, is become a great grievance to the country, in respect to their neglect and mismanagement their clients’ causes, and other fowl practices.”¹⁰

Whether for good reason or otherwise, lawyers were quite unpopular in other quarters, not only during the colonial period but even after the colonial period was over. During the Revolutionary War the enforcement of debts and legal obligations was largely suspended. After the war was over many old obligations were enforced, with resulting popular protest against the

⁵ 1 Hening, Stats. at Large (Va.), 349.

⁶ 1 Hening, 419.

⁷ 1 Hening, 495.

⁸ 1 Hening, 495-6; Neill, *Virginia Carolorum*, 264; Chitwood, *Justice in Colonial Va.*, 117; 1 Va. Colonial Dec. (Barton's Introd.), 173.

⁹ 1 Hening, 482.

¹⁰ 4 Hening, 360.

profession instrumental in enforcing them. The lawyers were denounced "as banditti, as blood-suckers, as pick-pockets, as wind bags, as smooth-tongued rogues." Those prosecuted complained that the lawyers were stirring up litigation. Those who had no cases complained that they were taxed to pay for the sittings of the courts in which they themselves had no business.¹¹ In 1786, in Massachusetts, lawyers were voted a grievance, a bill was passed by the house to throw open the courts to all persons of good character.¹²

Forms of punishment in early days were crude and in some cases most severe. Death, by the code of Jamestown, 1610, was the customary punishment for a long list of crimes, from stealing grapes or ears of corn to staying away from church three times in succession.¹³ Under the criminal code of the Northwest Territory a man who pulled down a copy of the posted laws or who defaced a proclamation of the governor, or destroyed a notice of the banns of matrimony, or the description of a stray cow, might be put in stocks for three hours and fined the cost of replacing the mutilated documents. A forger stood in the pillory for three hours. Thirty-nine stripes were administered upon one who robbed a house or broke into a shop or bore false witness against his neighbor. Children who disobeyed their parents, servants who disobeyed their masters, might be sent to jail "till they were humbled."¹⁴ In Massachusetts there are records that at the beginning of the nineteenth century a man convicted of the crime of larceny was sentenced to stand on the gallows for the space of an hour, with a rope around his neck, then was treated to twenty lashes on his naked back, and then to three years of hard labor. For counterfeiting he was pilloried and had the lower portion of his right ear cut off, and for burglary he was hanged by the neck until he was dead. In North Carolina a person found guilty of forgery must be adjudged to stand in the pillory one hour, and receive thirty-nine lashes on his bare back, and be imprisoned not less than six months, and fined at the discretion of the court. For the second offense he must on conviction "suffer death without benefit of clergy."¹⁵

¹¹ 1 McMaster, *History of U. S.*, 302.

¹² 1 McMaster, *History of U. S.*, 304.

¹³ Justice in Colonial Virginia, 14; 1 Va. Colonial Dec. (Barton's *Introd.*), 155 et seq.

¹⁴ 3 McMaster, *History of U. S.*, 113-14.

¹⁵ Laws, North Carolina, 1801, ch. 6.

It took some time to accomplish the separation of the judicial from the other functions of government. In some of the colonies the county court was fiscal agent of the county, levied and directed the disbursement of taxes, and licensed taverns and tippling houses.¹⁶ Judges and grand juries interested themselves much in public affairs that concerned in no manner the judicial function. In 1786, in North Carolina, a grand jury returned in their list of grievances the fact that Congress did not possess enough power to regulate trade. In Georgia a grand jury did the same, and at the same time complained that the state had refused to allow Congress to lay imposts on foreign goods.¹⁷ When the Northwest Territory was formed the governor and judges saw no impropriety in themselves framing a code of laws which they forthwith proceeded to enforce.¹⁸

Judges of the courts from lowest to highest not infrequently served in other public capacity. Jay, while Chief Justice of the United States Supreme Court, officiated as Secretary of State for nearly six months, undertook a mission to England for more than a year, and, while still sitting as Chief Justice, was elected governor of New York. Ellsworth, while on the bench of the supreme court of Connecticut, was a member of the constitutional convention, and, while Chief Justice of the United States Supreme Court, went as minister to France. While the Chief Justice was in France, Justice Chase left the bench to canvass the state of Maryland for the administration, leaving the court without a quorum.¹⁹ Marshall, after he took his seat as Chief Justice, on February 4, 1801, retained his place as Secretary of State in the cabinet of President Adams until March 4th, and continued so to act for a brief period after the incoming of the Jefferson administration.²⁰ Congress saw no impropriety in making the justices of the United States courts commissioners of pensions, but at this the justices themselves protested.²¹

Party spirit in the early days of the republic ran high. The like of it has never since been known. During the administration of John Adams a man would in some quarters be personally abused if he did not mount a black cockade, and in other quar-

¹⁶ 1 Va. Colonial Dec. (Barton's Introd.), 197.

¹⁷ 1 McMaster, 361; Pa. Gazette, Jan. 25, 1786.

¹⁸ 3 McMaster, 115.

¹⁹ Carson, Sup. Ct. of U. S., 115.

²⁰ Magruder, Life of Marshall, 155-6.

²¹ Note to Hayburn's Case, 2 Dall. 409.

ters he ran danger of personal violence if he did wear one. Social and family intercourse was destroyed in thousands of cases. A gentleman could hardly join a mixed company without being insulted by unsupportable epithets. To take the Aurora was a mark of political degradation. Credit was refused at banks to those who belonged to the "opposition." Partisan conflicts were forced into the most common transactions of life. In some places the different political groups met in actual combat with as much regularity as opposing armies.²² One Fourth of July in Wilmington it was agreed that adherents of both parties should celebrate jointly. The president of the day was to be a "federalist" and the vice-president a "democrat," and it was agreed the company should drink all toasts they might alternately propose. The president proposed a toast to John Adams and it was drunk by all. The vice-president then proposed a toast to Thomas Jefferson. It was generally drunk, but one imprudent man violently broke his glass. A general battle was imminent, but wiser counsels prevailed. The result, however, was an immediate separation and each party finished the celebration in its own way.²³

In 1801 the democrats elected Col. David Hall governor of Delaware. Fearing that the federalist senate would not truly proclaim the result of the election it was concluded to swear in Col. Hall as governor on the green before the state house if the senate persisted in this design. Preparatory to this it was needful that he take the oath. After much inquiry it was discovered that only one democrat in the whole state had authority to administer a common oath. Even the ubiquitous notary public had come within the proscription. How this one escaped was a matter of much speculation.²⁴

Under these conditions it is not strange that partisanship should sometimes invade the bench. The judges personally were partisans. A quest for non-partisan judges would have been vain, because there were no non-partisan people of any kind. Some judges sank their partisanship and decided cases impartially, but, as might be expected, not all of them did so. Some too were guilty, not only of displays of partisanship, but of other offenses and indiscretions as well. In Pennsylvania it is said the judges of the county courts were guilty of drunkenness and brawling

²² Munger, *History of Parties*, 15.

²³ Munger, *History of Parties*, 14-15.

²⁴ Munger, *History of Parties*, 28-9.

and vented petty spites toward such political opponents as came within their power. On one occasion during the campaign of 1800 two Pennsylvania judges sat undisturbed upon the bench while a clerk of quarter sessions was pummeled by a political enemy. On another occasion a judge quit the bench, went down into the crowd in the court room and engaged in a fist fight to resent an insult. Another judge once dragged a colleague from the bench to keep him from attending court. These county judges were generally small politicians. As a rule they were not lawyers. As a class they were described in a petition to the Pennsylvania legislature as, "destitute of all legal knowledge, burdensome and expensive." The justices of the peace were still worse. It is said many were tavern keepers. A few were charged with keeping houses of ill-fame.²⁵

One president judge of the Pennsylvania court of common pleas, Alexander Addison, in 1797, delivered from the bench a charge on "Causes and Error of Complaints and Jealousy of the Administration of the Government." He delivered another charge which he called the "Rise and Progress of Revolution." When he read this charge to the jury in Alleghany county one of the other judges arose to make reply, but Addison silenced him by invoking a rule of the court that the president judge alone should address the jury.²⁶ Addison was later, with some propriety, impeached and removed from office.

In the United States court Judge Pickering, of the New Hampshire circuit, was once so drunk during the trial of a case, and his language so incoherent and profane, his behavior so wild, that a postponement to the following day was asked. "I will give you to all eternity," he said, and adjourned court, remarking as he did so that to-morrow he would be sober. On the morrow his condition was not improved. He was impeached, convicted by the senate, and removed from office.²⁸

It is not to be supposed that such conditions as these were universal in any section. But it is worthy of notice that such conditions could have existed at all.

Unfortunately impeachment was not always directed toward such real misconduct. The Pennsylvania house, in 1805, impeached Justices Shippen, Yeates and Smith of the supreme court, men of distinguished service, because they imprisoned

²⁵ 3 McMaster, 153-4.

²⁶ 3 McMaster, 155-6.

²⁸ 3 McMaster, 166-7.

one Passmore, a litigant, for contempt of court. The senate, after trial, declared them not guilty by a vote of thirteen to eleven. Brackenridge, the only democratic judge on the supreme bench, wrote the legislature, told them he approved the action of the court in the Passmore case, and asked that he also be impeached. The legislature called on the governor to remove him for his insolence.²⁹

The misdoings of the brilliant and popular Chase are quite well known. Before the trial of Callender for sedition opened, statements were made and sworn to that Chase "had commanded the Marshal to see that some of the rascals called Democrats were put in the jury, and that . . . he had shown how he would draw the best lawyers of Virginia across his knees and flog them out of their nullifying mood."³⁰ This was but parcel of the charges freely made that in indictments under the sedition law packed juries and partisan judges had been combined.³¹ In 1803 Chase delivered a charge to the grand jury at Baltimore, beginning with matters appertaining to their duties as jurors and ending with matters appertaining to politics. He could not, he said, suffer the jury to go to their chamber without a few words on the welfare and prosperity of the country. The course of recent congressional legislation would, he said, surely and quickly destroy all protection to property, all security to personal liberty, and sink the country into a mobocracy.³² These and other improprieties which would be considered intolerable now were made the basis of impeachment by the house. The impeachment and trial proceeded along partisan lines. Not enough votes could be mustered in the senate to convict.

Even Chief Justice Marshall has not been free from the charge of display of partisanship from the bench. In the early days of the Jefferson administration the Federal judges undoubtedly felt themselves persecuted. The judiciary act of February 27, 1800, increasing their number, was repealed. The August term of the Supreme Court was abolished by an act of Congress with the manifest purpose of crippling the court. Impeachment proceedings had been instituted and others threatened, which, whatever may be said of their propriety, were prompted by partisan motives. The impeachment of Pickering, started in response to

²⁹ 3 McMaster, 159.

³⁰ 2 McMaster, 470.

³¹ 2 McMaster, 472.

³² 3 McMaster, 168-9.

a message from the President, was regarded unjustifiable because of the belief that the judge was clearly insane. At this stage came the decision of the Supreme Court, written by Marshall, in the case of *Marbury v. Madison*, 1 Cranch, 137. By this decision, says one distinguished historian, "Marshall hurled back a defiance from the Supreme Bench."³³ That case was an original proceeding in mandamus instituted in the United States Supreme Court to compel Madison, as Jefferson's Secretary of State, to deliver to Marbury a commission as justice of the peace of the District of Columbia. The commission had been made out and signed by President Adams, but not delivered. A Federal statute gave to the Supreme Court original jurisdiction in mandamus. The court, by a decision that has become memorable, declared this statute unconstitutional, and held that it had no jurisdiction of the case. The decision might have stopped there, but it did not. The court, although holding that it had no jurisdiction of the case, decided that Marbury had a right to the commission. Jefferson attacked this portion of the decision bitterly. In a letter to a friend he denounced the decision, so far as it undertook to determine Marbury's right to the commission, as "an obiter dissertation of the Chief Justice."³⁴ The basis of his criticism was that, "The court determined at once that, being an original process, they had no cognizance of it; and therefore the question before them was ended. But the Chief Justice went on to lay down what the law would be, had they jurisdiction of the case." The historian above quoted justifies this criticism. "Jefferson," he says, "justly felt that John Marshall had openly defied him," for "the bold language in which the Chief Justice had defined the Executive power, had set forth the Executive duties, had accused the President of violating a vested legal right, above all, the unusual way in which the decision had been made, could mean nothing else than defiance."³⁵

In some states, after the revolution, opposition to the local courts reached even the point of violence. In August, 1786, the judges of the Massachusetts court of common pleas, when they went to convene court at Northampton, found the court house in the possession of an armed mob of 1,500 men.³⁶ In other counties sittings of courts were prevented and all public sales

³³ 3 McMaster, 167.

³⁴ Letter to Justice Johnson, 1823.

³⁵ 3 McMaster, 167-8.

³⁶ 1 McMaster, 306.

of goods seized by distress prevented. At Great Barrington malcontents not only prevented the sitting of the court of common pleas, but broke open the jail, set the prisoners free, and succeeded in compelling three of four judges to sign a paper not to act under their commissions until the grievances of the people were fully redressed.³⁷ The supreme court held its session only under the protection of the militia.³⁸ Similar forcible measures were taken in New Hampshire and Vermont.³⁹

Reference has already been made to some of Jefferson's strictures upon the Federal courts. On many occasions he expressed himself on this subject in no uncertain terms. Chief Justice Marshall, whose fame in our day "oversteps that of all other American Judges,"⁴⁰ was the center of attack. On May 3, 1802, Jefferson charged that Marshall's life of Washington, then in process of preparation, was "intended to come out just in time to influence the next presidential election," and added, "It is written, therefore, principally with a view to electioneering purposes."⁴¹ In a letter to Madison, May 25, 1810, he spoke of "the rancorous hatred which Marshall bears to the government of his country and . . . the cunning & sophistry within which he is able to enshroud himself;" and in a letter to his friend Thomas Ritchie, December 25, 1820, he characterized Marshall as "a crafty chief judge, who sophisticates the law to his mind, by the turn of his own reasoning." And in the same letter he said, "The Judiciary of the United States is the subtle corps of sappers and miners constantly working underground to undermine the foundation of our confederated fabric." In a letter to Judge Roane, March 9, 1821, he wrote, "The great object of my fear is the federal judiciary. That body, like gravity, ever acting, with noiseless foot, and unalarming advance, gaining ground step by step, and holding what it gains, is engulfing insidiously the special governments into the jaws of that which feeds them."

Those who are concerned over the criticism of present day courts and judges may well bear in mind that we are not familiar with any impeachment so severe as that which was common in Marshall's time. No man of such exalted position as Mr. Jefferson has ever indulged so unsparingly in condemnation of the

³⁷ 1 McMaster, 309-10.

³⁸ 1 McMaster, 310.

³⁹ 1 McMaster, 343-354.

⁴⁰ 1 Bryce, *Am. Com.*, 267.

⁴¹ Letter to Joel Barlow.

courts as did he. No other president or ex-president of the United States has ever accused any Chief Justice of the Supreme Court of the United States of "craftiness" or "cunning," or any other quality equally significant of sinister purpose.

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